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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1298

ESTATE OF WILLIAM DOUGLAS CHEW, JR., CARRIE COLE CHEW, MOTHER AND SOLE HEIR, *Petitioner*,

v.

JOSEPH D. NUNAN, JR., Commissioner of Internal Revenue, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above-named petitioner, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered March 1, 1945, in the above entitled proceedings, docketed therein as No. 11145.

OPINIONS BELOW.

The opinion of The Tax Court of the United States is reported at pages 19 et seq. of the record. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is found at pages 33 et seq. of the record herein.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was entered on March 1, 1945. (R. 41.) The jurisdiction of this Court is invoked under the provisions of Section 347(a), Title 28 USCA.

QUESTIONS PRESENTED.

1. Where amounts are received by a beneficiary other than the executor of the insured as the result of a transaction which involved an actual insurance risk at the time the transaction was executed, but do not exceed the amount of $40,000; are they exempted from Federal estate tax as provided by Section 811(g) of the Internal Revenue Code?

2. Where a limited amount of insurance is paid to a beneficiary other than the executor of the insured as a result of a transaction which involved an actual insurance risk at the time the transaction was executed, is the death of the insured by self-destruction the essential equivalent of a transfer of property to take effect in possession and enjoyment at or after death, or in contemplation of death, within the meaning of Section 811(c) of the Internal Revenue Code?

STATUTES AND REGULATIONS.

Internal Revenue Code:

"SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest.*—To the extent of the interest therein of the decedent at the time of his death;

* * * * * * * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter.

* * * * * * * * *

(g) *Proceeds of Life Insurance.*—To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life." (26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

"SEC. 81.15. *Transfers during life.*—The following classes of transfers made by the decedent prior to his death, whether in trust or otherwise, if not constituting bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: (1) transfers in contemplation of death (see section 81.16); (2) transfers conditioned upon the decedent's death (see section 81.17); * * * (4) transfers under which the decedent retained the right either alone or

in conjunction with another person or persons, to designate who should possess or enjoy the property or the income therefrom (see section 81.19); and (5) transfers under which the enjoyment of the transferred property was subject at decedent's death to a change through the exercise, either by the decedent alone or in conjunction with another person or persons, of a power to alter, amend, revoke, or terminate, or where such a power was relinquished in contemplation of decedent's death (see sections 81.20 and 81.21).

* * * * * * * * *

"SEC. 81.17. *Transfers conditioned upon survivorship.*—The statutory phrase, 'a transfer * * * intended to take effect in possession or enjoyment at or after his death,' includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. In such instances, it is immaterial whether the decedent's interest arose by implication of law or by the express terms of the instrument of transfer. Since in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated by a reversion or a possibility of reverter, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, * * *

* * * * * * * * *

SEC. 81.19. *Transfers with right retained to designate who shall possess or enjoy.*—The Internal Revenue Code (section 811 (c)) provides that, except in the case

of a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate shall embrace all property transferred by the decedent, whether in trust or otherwise, if there is retained by or reserved to him for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period, or for a period not ascertainable without reference to his death, the right either alone or in conjunction with any other person or persons to designate the person or persons who shall possess or enjoy the transferred property, or the income thereof. * * *

* * * * * * * * *

SEC. 81.20. *Transfers with power to change the enjoyment.*—(a) *Transfers included.*—Sub-section (d) of section 811 embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (Section 811.15.)

* * * * * * * * *

(3) If the transfer was made after June 22, 1936 (the date of the enactment of the Revenue Act of 1936), and the power was either reserved at the time of the transfer or later created or conferred, without regard to the source from which the power was acquired, and whether exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

* * * * * * * * *

STATEMENT.

The facts found by The Tax Court (R. 19-21) in accordance with stipulations of the parties, are substantially as follows:

On August 14, 1940, two fifteen-year endowment policies were issued to the decedent, William Douglas Chew, Jr., by the New York Life Insurance Company. These policies were described as "15 Year Endowment—Single Premium —Endowment payable in 15 years or at prior death", and provided for the payment of the principal sums of $21,200 and $10,000, respectively. On these the respective premiums of $15,072.35 and $7,109.60 were prepaid. (R. 20.) On September 30, 1940, a policy described as a "Twenty-Payment Life" policy was issued by the same company to the decedent. This policy provided for the payment of the principal sum of $10,000 upon the death of the decedent. The first of the twenty annual premiums, $357.90, was paid. (R. 20-21.) In all three policies, the mother of the decedent, Mrs. Carrie Cole Chew, was named as the beneficiary. (R. 20.) But all three provided that should the beneficiary predecease the insured, the interest of such beneficiary should vest in the insured. (R. 20.) All three policies also granted to the insured the right to change the beneficiary and guaranteed to him loan and surrender values. (R. 22.) In addition all three policies contained the following suicide clause (R. 20-21):

> "In the event of self-destruction during the first two insurance years, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premiums hereon which has been paid to and received by the Company and no more."

On November 28, 1940, three months after the issuance of the endowment policies, and two months after issuance of the twenty-payment life policy, the insured died under circumstances which indicated self-destruction. The coroner's records described the cause of death as "suicide by

firing pistol into heart." (R. 20.) Settlement was made between the insurance company and the beneficiary under the suicide provisions of the policies (R. 20-21); and the sums payable to the beneficiary equalling the total of premiums paid, $22,539.85, were left at interest with the company under a certificate of deposit, dated February 10, 1941. The insurance company described the sums paid as refund of premiums in the certificate of deposit and in its records recording the payments. (R. 21, 23.) The payments were also described as a refund of premiums in Treasury Form 712 which the insurance company filed with the decedent's estate tax return. (R. 21.)

Under a judgment of succession entered August 4, 1941, by the First District Court of Caddo Parish, Louisiana, Carrie Cole Chew was named as mother and sole heir of the decedent. (R. 19.) In the estate tax return filed on behalf of the decedent's estate, the amounts payable to the beneficiary under the fifteen year endowment and the twenty payment life policies, $22,539.85, were included in the total sum of $32,640.03 reported as amounts paid to beneficiaries as insurance. An exemption from the gross estate was claimed for this amount under Section 811 (g) which exempted from inclusion in the gross estate the first $40,000 receivable by beneficiaries as insurance. (R. 21.) The Commissioner determined a deficiency of $2,984.50 against the estate, contending that the $22,539.85 did not constitute amounts receivable as insurance and that they should be included in the gross estate of the decedent. The Tax Court sustained the Commissioner's contention on the basis of the definition of insurance prescribed by *Helvering* v. *Le Gierse*, 312 U. S. 531, and included the $22,539.85 as a part of the gross estate under Section 811 (c) of the Internal Revenue Code. (R. 22-23.) The Circuit Court of Appeals also relies upon the *Le Gierse case, supra*, and affirmed the judgment of The Tax Court. (R. 33.)

SPECIFICATION OF ERRORS.

The United States Circuit Court of Appeals erred:

1. In holding that amounts received as the result of a transaction which involved an actual insurance risk at the time the transaction was executed is not within the meaning of Section 811 (g) of the Internal Revenue Code.

2. In holding that the provisions of policies of insurance, which involve an actual insurance risk at time the transaction is executed, may be construed as effecting a transfer of property within the meaning of Section 811 (c) of the Internal Revenue Code.

3. In holding, in effect, that the insured and the insurer planned an arrangement which, from its inception, was not insurance; but a means to transfer property at time of death of the insured by self-destruction.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Circuit Court in this case is based entirely upon the opinion of this Honorable Court in the case of *Helvering* v. *Le Gierse*, 312 U. S. 531. In order to make the principles of law decided in the *Le Gierse case*, *supra*, applicable to the question presented in this case, there must be evidence to support a finding of fact that the insurance policies in question did not involve an actual insurance risk at the time the transaction was executed. Also, there needs to be a finding, supported by substantial evidence, that the insurance policies were taken out in contemplation of death by self-destruction.

2. It is said in the majority opinion of the Court that the "suicidal clause" of the policies "is an agreement of the contracting parties" which was intended to destroy the "actual insurance risk" involved in the beginning, and that the purpose of said clause in the policies was to suspend the insurance risk involved until the effective period of said

clause had expired. That during the effective period of said "suicidal clause" the insurance company became the custodian only of the naked amount of the premiums paid with only the duty to return the aggregate amount thereof to the insured's heirs or designated beneficiaries when death of the insured by self-destruction occurred. It is hard to believe that the insurance company would make the kind of an agreement that the Court below undertakes to spell-out. Such an agreement would not be in the nature of an annuity.

3. The decision in the *Le Gierse case, supra,* turned upon a proposition of law, supported by ample facts, that the absence of an "actual insurance" risk at the inception of the transaction converted the cost of *insurance received* by the beneficiary upon the death of the *insured* into a transfer of property in contemplation of death; nevertheless, the Court below says that the principle of law established by the *Le Gierse case, supra,* may be applied to a wholly different situation. The decision in the *Le Gierse case* holds that the contract involved was more in the nature of an *annuity* than it was an insurance policy; and being an annuity contract *in its entirety,* the amounts paid thereunder were not received as the result of a transaction which involved an actual insurance risk at the time executed. The decision in the *Le Gierse case, supra,* does not stand for the proposition of law to which it has been applied by the Court below in this case; and if the decision below be not corrected, it will cause great confusion in the administration and application of the law involving life insurance as well as the laws of taxation.

4. The contracts of life insurance involved in this proceeding were made, executed and delivered in the State of Louisiana, and for that reason must be construed and applied according to the laws of that State. (See *Erie Railroad Company* v. *Tompkins,* 304 U. S. 58, 82 L. Ed. 1188.) It is the settled law of Louisiana (see *Moore* v. *Southern*

Life & Health Company, 195 So. 857, and *Grey* v. *Louisiana Industrial Life*, 193 So. 278) that provisions in a policy, providing for a recovery of less than the full amount of the policy, are valid insurance clauses and that they are integral parts of the insurance contract to be carried out as written. The clause of the policies in this case, limiting insurance liability in the event of suicidal death of the insured, is not contrary to the public policy of the State of Louisiana, declared by statute, so as to require proof by the insurer that the insured contemplated death by self-destruction when the policies were executed (see *Whitefield* v. *Aetna Life Insurance Company*, 205 U. S. 489); and in the case of *Northwest Mutual Life Insurance Company* v. *Johnson*, 254 U. S. 96, it is held that unless suicide is contemplated by the insured when the policies of insurance are taken out, death from such cause is not an excludable risk as a matter of law or as a matter of public policy. The State in which a policy is delivered has the exclusive right to fix the public policy with respect to excluding suicide as an insurable risk, or limiting the amount of insurance payable in the event of such character of death. (See *Northwest Mutual Life Insurance Company* v. *Johnson*, *supra*.) The laws of Louisiana (Louisiana General Statutes, compiled by Benjamin Wall Dart, 1939, Vol. 3, on the subject of life insurance) do not exclude suicide as an insurable risk. The decision of the Court below decides a question of law, applicable only to the State of Louisiana, contrary to the public policy of that State as defined by its Courts. (See *Moore* v. *Southern Life & Health Company; Grey* v. *Louisiana Industrial Life*, *supra;* and *Equitable Life* v. *First National Bank*, 113 Fed. (2d) 272.) Section 811(g) of the Internal Revenue Code uses the term "insurance" in its common meaning and as generally applied in contracts controlled by laws of the various States. It is not concerned with causes of death.

5. The decision of the Court below, in effect, holds that the insured in this case contemplated death by self-destruc-

tion when the policies of life insurance were taken out; whereas, there is no finding by The Tax Court to support such a holding, nor is there any evidence from which it may be inferred that the insured took out the policies in contemplation of death by self-destruction. Section 811(c) of the Internal Revenue Code creates no presumption that amounts received as the result of a transaction which involved an actual risk of insurance at the time executed may be treated as property transferred in contemplation of death. Therefore, the decision of the Court below is contrary to the principle of law established by this Court in the case of *Helvering* v. *Le Gierse, supra.*

6. Since the Court below undertakes to make out an agreement between the parties with respect to the amounts received under the policies not being insurance, but being the transfer of property in contemplation of death; the agreement to be adjudged by the Court should be one of "limited insurance", according to the law of Louisiana, rather than one dealing with the morbid question of death by self-destruction. The clause of "limited liability" in the policies is not an agreement of an independent character, but is an integral part of the transaction which involved an actual insurance risk at the time executed. The fact that the amount of insurance payable was limited by the happening of a subsequent event should not be held to change the substance of the contract executed. The *Le Gierse case, supra,* does not so hold.

7. The general rule is that where a policy of insurance is taken out by an insured in contemplation of suicide, the policy is void as against public policy but it should not be assumed, without supporting evidence, that a person contemplates death by self-destruction. A clause in a policy of insurance, limiting liability in the event of death by suicide, should not be construed to be an "agreement" between the parties to effect a transfer of property at the time of death, within the meaning of Section 811(c) of the

Internal Revenue Code. If the clause in question may be lifted to the dignity of an independent *agreement*, it should be held to be an agreement in conformity to law as regards the subject of insurance. (See *Moore* v. *Southern Life & Health Company, supra.*)

WHEREFORE, in order to have the conflict appearing herein resolved, and provisions of Section 811(g) of the Internal Revenue Code, with respect to the amount received as the result of a transaction which involved an actual risk of insurance at the time executed, properly applied, petitioner prays that a writ of certiorari may be issued herein directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding said Court to certify and send to this Court on a day to be therein designated a full and complete transcript of the record and proceedings of said Circuit Court of Appeals in this case entitled *Estate of William Douglas Chew, Jr., Carrie Cole Chew, Mother and Sole Heir*, v. *Commissioner of Internal Revenue*, No. 11145, to the end that said case may be viewed and determined by this Court as provided by law, and the decision rendered therein reversed.

Respectfully submitted,

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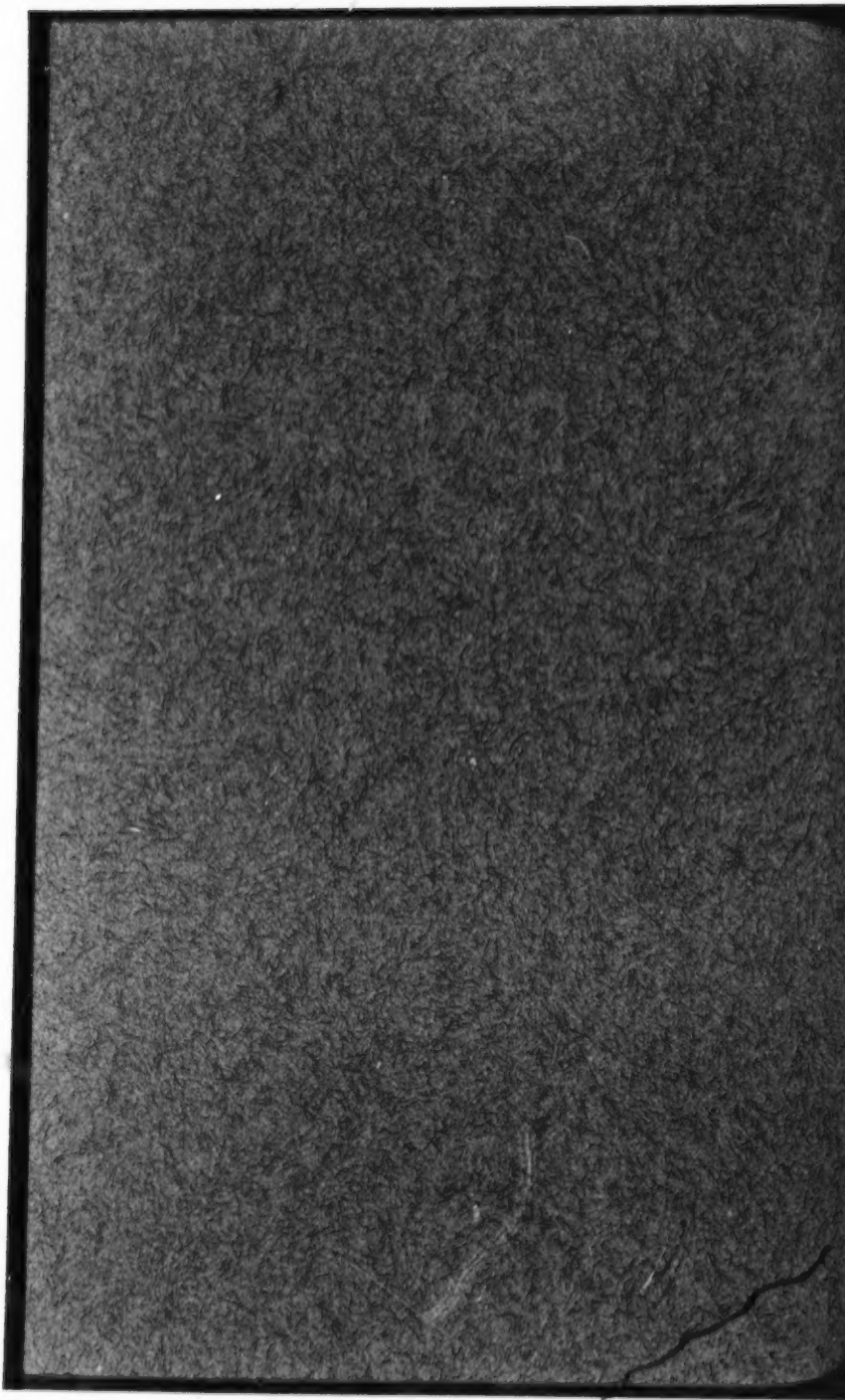

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1298

ESTATE OF WILLIAM DOUGLAS CHEW, JR., CARRIE COLE CHEW, MOTHER AND SOLE HEIR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 32–38) is reported at 148 F. 2d 76. The opinion of the Tax Court (R. 18–23) is reported at 3 T. C. 940.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 38) was entered on March 1, 1945. The petition for a writ of certiorari was filed on May 21, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Where an insured person takes his own life within two years after the issuance to him of insurance policies containing a provision limiting the liability of the insurer, in case of self-destruction, to the repayment of the amount of premiums paid, without interest, are the amounts paid under such provision to beneficiaries other than the decedent's estate amounts receivable "as insurance" within the meaning of Section 811 (g) of the Internal Revenue Code, permitting the exclusion from the gross estate of the decedent of such amounts not in excess of $40,000?

2. If the amounts here involved do not constitute amounts receivable "as insurance" within the meaning of Section 811 (g), are they includible in the decedent's gross estate under Section 811 (c) of the Internal Revenue Code?

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code and the Treasury Regulations involved are printed in the Appendix, *infra*, pp. 10–14.

STATEMENT

This proceeding involves a deficiency in federal estate tax asserted against the estate of William Douglas Chew, Jr., deceased, who died on November 28, 1940, under circumstances which indicated self-destruction (R. 19–20).

The facts of this case are not in dispute. At the time of his death the decedent was possessed

of a large estate, including three insurance policies which give rise to the present controversy. All three of these policies were issued by the New York Life Insurance Company, a mutual company, within four months prior to the death of the decedent, and in each the mother of the decedent was named as beneficiary. Each policy also provided that in the event the designated beneficiary should predecease the insured, the interest of such beneficiary should vest in the insured. (R. 20.)

Two of the three policies in question were "single premium" policies, and were issued on August 14, 1940. One policy was for the amount of $21,200, on which there was a single premium paid of $15,072.35, and another was for the amount of $10,000, on which there was a single premium paid of $7,109.60. Each of these was described as "15 Year Endowment—Single Premium—Endowment payable in 15 years or at prior death". The third policy was issued on September 30, 1940, for the amount of $10,000, and was a "Twenty-Payment Life" policy which provided for the payment of an annual premium of $357.90. (R. 20.) Each policy contained the following clause (R. 20–21):

> In the event of self-destruction during the first two insurance years, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premium hereon which has been paid

to and received by the Company and no more.

At the time of the decedent's death the foregoing policies were in full force and effect. The sums paid as premiums thereon up to that time aggregated $22,539.85, and because of the circumstances under which the decedent died (described in the coroner's records of Caddo Parish, Louisiana, as "suicide by firing pistol into heart"), the New York Life Insurance Company admitted liability only for an amount equal to the amount of premiums paid. According to the records of the insurance company, the proceeds of the three policies, $22,539.85, were left on deposit with the company, at interest, in the name of the beneficiary, Carrie Cole Chew, in accordance with an option contained in the insurance contracts. The insurance company reported the payments called for under the policies as "premiums refunded", upon Treasury Form 712 filed with the decedent's estate tax return. (R. 20–21.)

In the estate tax return the amount of $22,539.85, representing the proceeds of the above three policies, along with the proceeds, amounting to $10,100.18, of two other policies held by the decedent and payable to his mother as beneficiary, was included in gross estate as insurance payable to a beneficiary other than the estate of the deceased, and the specific exemption of $40,000 permitted by Section 811 (g) of the Internal Revenue Code was

claimed against the above amounts aggregating $32,640.03 (R. 21).

In determining the estate tax deficiency here involved, the Commissioner, among other adjustments to gross and net estate reported (R. 9), denied the exemption of the above $22,539.85 under Section 811 (g) as "insurance" paid to beneficiaries other than the decedent's estate, and held that it was taxable as part of the decedent's gross estate "without the application against same of any portion of the specific exemption of $40,000.00 provided for in section 811 (g), supra" (R. 11–12).

The Tax Court held that because of the self-destruction provision of the policies in question, and the circumstances of the decedent's death, the sums paid under those policies were not "receivable * * * as insurance" by beneficiaries other than the decedent's estate, within the meaning of Section 811 (g), and that the total amount was includible in the gross estate under Section 811 (c) of the Internal Revenue Code (R. 18–23). The Circuit Court of Appeals affirmed the decision of the Tax Court (R. 32–38).

ARGUMENT

The decision of the court below is not in conflict with any other decision and we believe that there is no other ground justifying the granting of a writ of certiorari.

The petitioner raises two questions (Pet. 2): (1) Whether the amounts aggregating $22,539.85 payable under the three insurance policies under the circumstances shown by the record constitute amounts "receivable * * * as insurance" by beneficiaries other than the estate of the decedent within the meaning of Section 811 (g) of the Internal Revenue Code (Appendix, *infra*, p. 11); and (2) if such amounts do not constitute "insurance" within the meaning of the statute, whether the transactions involved constitute transfers in contemplation of death or intended to take effect in possession or enjoyment at or after death, within the meaning of Section 811 (c) of the Internal Revenue Code (Appendix, *infra*, pp. 10–11). Without citing any decision to the contrary, the petitioner urges that the Tax Court and the Circuit Court of Appeals were wrong in their decision of each question (Pet. 8–12).

1. The courts below held that the amounts here involved did not constitute amounts payable "as insurance" within the meaning of Section 811 (g). We believe that they correctly concluded that the definition of "insurance" in *Helvering* v. *Le-Gierse*, 312 U. S. 531, for purposes of an identical statutory provision, is controlling here. There this Court, defining insurance as involving risk-shifting and risk-distribution, said that the fair import of the statute is that the amounts must be received as a result of a transaction which involved an

actual insurance risk "at the time the transaction was executed" (312 U. S. at p. 539). From the finding (R. 20) that the insurance company admitted liability only with respect to the clause restricting its liability in the case of the insured's self-destruction to amounts equal to the premiums paid, it is clear that the amounts involved were not paid on an insurance risk but were merely the refund of premiums. Whether or not the insurance company assumed such risks under other clauses of the policies is unimportant. What is material is that any amounts payable in the event of death by self-destruction within the first two insurance years were not payable on account of any "insurance risk" assumed by the company.

The state court decisions cited by the petitioner (Pet. 9–10) have no bearing upon the question. The question here involves the construction of the term "insurance" as used in this particular statute, and the application of that construction to the facts of this case. Cf. *Estate of Henry W. Putnam* v. *Commissioner,* decided by this Court on March 26, 1945, not yet reported, and cases cited.

2. Petitioner's contentions with respect to the second question are untenable. Although the burden was on the petitioner, its petition before the Tax Court (R. 3–6) did not question whether the payments made under the policies constituted transfers in contemplation of death

or intended to take effect at death, nor was any proof to that effect offered. The Tax Court stated (R. 22) that there was no claim that the amounts involved are not a part of the gross estate if the exclusion provided for in Section 811 (g) should be inapplicable. At any rate, the courts below properly held that the amounts are includible in the gross estate if the exclusion does not apply. In addition to transfers made in contemplation of death, or to take effect at death, Section 811 (c) also applies where, as here, the decedent retained the right "either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property". Innumerable decisions holding transfers includible in the gross estate under Section 811 (c) or corresponding provisions of earlier Revenue Acts, support the conclusion of the courts below. See, *e. g., Helvering* v. *LeGierse,* 312 U. S. 531; *Estate of Keller* v. *Commissioner,* 312 U. S. 543; *Helvering* v. *Hallock,* 309 U. S. 106; *Chase Nat. Bank* v. *United States,* 278 U. S. 327; *Kernochan* v. *United States,* 29 F. Supp. 860 (C. Cls.), certiorari denied, 309 U. S. 675; *Helvering* v. *Tyler,* 111 F. 2d 422 (C. C. A. 8th), affirmed, 312 U. S. 657; *Old Colony Trust Co.* v. *Commissioner,* 102 F. 2d 380 (C. C. A. 1st).

3. This case does not present a question of sufficient general importance to justify review by this Court. Section 811 (g) of the Internal Revenue Code was amended by Section 404 of the Revenue Act of 1942, c. 619, 56 Stat. 798, 944, to

eliminate the exclusion previously granted for insurance paid to beneficiaries other than the decedent's estate. The amendment is applicable to the estates of decedents dying after the date (October 21, 1942) of enactment of the Act. Section 401 of the 1942 Act, *supra*.

CONCLUSION

The decision below is correct and there is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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JUNE 1945.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest.*—To the extent of the interest therein of the decedent at the time of his death;

* * * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of

his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter.

* * * * *

(g) *Proceeds of Life Insurance.*—To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life. (26 U. S. C. Sec. 811.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

SEC. 81.15. *Transfers during life.*—The following classes of transfers made by the decedent prior to his death, whether in trust or otherwise, if not constituting bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: (1) transfers in contemplation of death (see section 81.16); (2) transfers conditioned upon the decedent's death (see section 81.17); * * * (4) transfers under which the decedent retained the right, either alone or in conjunction with another person or persons, to designate who should possess or enjoy the property or the income therefrom (see section 81.19); and (5) transfers under which the enjoyment of the transferred property was subject at decedent's death to a change through

the exercise, either by the decedent alone or in conjunction with another person or persons, of a power to alter, amend, revoke, or terminate, or where such a power was relinquished in contemplation of decedent's death (see sections 81.20 and 81.21).

* * * * *

SEC. 81.17. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should be survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. In such instances, it is immaterial whether the decedent's interest arose by implication of law or by the express terms of the instrument of transfer. Since in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, and whether the in-

terest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, * * *

* * * * *

SEC. 81.19. *Transfers with right retained to designate who shall possess or enjoy.*—The Internal Revenue Code (section 811 (c)) provides that, except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate shall embrace all property transferred by the decedent, whether in trust or otherwise, if there is retained by or reserved to him for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period, or for a period not ascertainable without reference to his death, the right either alone or in conjunction with any other person or persons to designate the person or persons who shall possess or enjoy the transferred property, or the income thereof. * * *

* * * * *

SEC. 81.20. *Transfers with power to change the enjoyment.*—(a) *Transfers included.*—Subsection (d) of section 811 embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction

with some other person or persons, to alter, or amend, or revoke, or terminate.

(See section 811.15.)

* * * * *

(3) If the transfer was made after June 22, 1936 (the date of the enactment of the Revenue Act of 1936), and the power was either reserved at the time of the transfer or later created or conferred, without regard to the source from which the power was acquired, and whether exercisable by the decedent alone or in conjunction with a person or persons either having or not having a substantial adverse interest or interests in the transferred property, or in conjunction with persons one or more of whom had and one or more of whom had not such an adverse interest.

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